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No. 84-1747

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEO F. SHOULTZ, PETITIONER

v.

MONFORT OF COLORADO, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether persons who make nondefamatory communications to the supervisors of a federal official for the purpose of having him removed or transferred from his job may be sued under 42 U.S.C. 1985(1).

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is a former meat inspector employed by the United States Department of Agriculture. Before October 4, 1977, he was assigned to inspection duties at a meat processing and packing plant operated by respondent Monfort of Colorado, Inc., in Greeley, Colorado. Petitioner has alleged that Monfort and its officers knowingly and intentionally violated federal regulations, that petitioner sought to enforce those regulations, and that Monfort officers caused petitioners' superiors to transfer him out of the Monfort plant and ultimately to another region. Pet. App. 16, 42-46.

Petitioner brought suit in the United States District Court for the District of Colorado against Monfort of Colorado, Inc., two Monfort officers (Kenneth W. Monfort, the chairman of the board of directors, and Samuel D. Addoms, the president), and four officials of the Department of Agriculture. Petitioner's amended complaint asserted three causes of action. In the first cause of action, petitioner alleged (Pet. App. 46-47) that the nonfederal defendants had conspired against him in violation of 42 U.S.C. 1985(2). (Petitioner appears to have meant 42 U.S.C. 1985(1).) Specifically, petitioner alleged that (Pet. App. 43):

> the Defendant Addoms mailed a letter to Plaintiff's area supervisor demanding Plaintiff's immediate removal as an inspector. Defendant Kenneth W. Monfort telephoned Plaintiff's supervisors in Washington, D.C., demanding the Plaintiff be removed from the Defendant's meat processing packaging plant in Greeley, Colorado, and be reassigned to a different location neither owned nor operated by Defendant and both of said individual Defendants and other agents and servants of the Defendant company did continue in their efforts to cause the removal and reassignment of plaintiff to other states far removed from his domicile; and as a consequence of said malicious acts, Plaintiff was detailed on or about October 4, 1977, to another Federally-inspected facility in Denver, neither owned or operated by Defendant.

Petitioner also alleged, as part of his first cause of action, that the federal defendants violated 42 U.S.C. 1986 because "having knowledge that the said wrongs conspired to be done, were about to be committed, and having power to prevent or aid in preventing the commission of the same, [they] neglected and refused to do so" (Pet. App. 46-47). In addition, petitioner's first cause of action made references

(*id.* at 46) to the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, although it is unclear whether he intended to assert a claim under that Act.

Petitioner asserted two additional causes of action, neither of which is relevant for present purposes. In the second cause of action (Pet. App. 47-49), petitioner alleged that the defendants had conspired, in violation of 42 U.S.C. 1985(2), to prevent him from suing for an injury he suffered in an accident at the Monfort plant. In his final cause of action (Pet. App. 49-50), petitioner alleged that the federal defendants violated his Fifth Amendment rights, "in particular * * * the right to initiate and prosecute a civil action for damages" (*id.* at 50). For these alleged violations, petitioner sought $250,000 in actual damages and $250,000 in exemplary damages. *Ibid.*

2. The district court dismissed all of petitioner's claims (Pet. App. 30-38). In dismissing petitioner's claim that the nonfederal defendants conspired to have him removed from his job or transferred, the court relied (Pet. App. 33) on *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), cert. denied, 434 U.S. 975 (1977), which held (547 F.2d at 1342-1346) that 42 U.S.C. 1985(1) did not permit a suit by an IRS agent who claimed that he suffered adverse personnel action and damage to his reputation due to defamatory complaints made to his supervisors by the officers of a company he was auditing. The *Stern* court examined (547 F.2d at 1334-1336) the legislative history of Section 1985(1), which originated as part of Section 2 of the Ku Klux Act, ch. 22, 17 Stat. 13. The court noted that Congress's concern was the use of physical force and intimidation against federal officials (547 F.2d at 1334-1335). Indeed, the court observed (*id.* at 1335):

> It would * * * surprise us if any member of that Congress ever specifically contemplated the application of

> the provisions which became § 1985(1) to a conspiracy to defame and discredit [a federal official] to his superiors.

The *Stern* court nevertheless refused to confine Section 1985(1) to the abuses that motivated its enactment (547 F.2d at 1335), and the court rejected several limiting arguments advanced by the defendants (*id.* at 1336-1342). However, the court concluded (*id.* at 1342-1343) that Petition Clause (Amend. I) problems would be created if Section 1985(1) were interpreted as reaching the conduct in question, and the court refused (547 F.2d at 1344) to adopt this construction in the absence of evidence that Congress specifically so intended.

The district court rejected any claim under the Federal Meat Inspection Act, finding "no intent on the part of Congress to imply a tort remedy" (Pet. App. 31). The court also rejected petitioner's constitutional tort claims against his supervisors because (*ibid.*):

> Federal employees have rights and rights and rights and rights and rights and rights that most people don't have, and to say they can just sue their bosses instead of following the statutory scheme that has been created for federal employees * * * is something I just cannot go along with.

3. The court of appeals affirmed (Pet. App. 14-29). With respect to petitioner's claim under Section 1985(1), the court of appeals agreed with the Seventh Circuit's decision in *Stern* (Pet. App. 19). With respect to petitioner's claim under Section 1985(2) that the defendants conspired to prevent him from suing for an injury suffered in an accident, the court of appeals noted (Pet. App. 20) that Section 1985(2) applies only to interference with the right to sue in federal court and that petitioner did not allege diversity of citizenship with Monfort of Colorado, Inc. Finally, the

court of appeals held (Pet. App. 21-25) that there is no implied private right of action available to meat inspectors under the Federal Meat Inspection Act and that petitioner's constitutional tort claims against his supervisors based on personnel actions were barred by *Bush* v. *Lucas*, 462 U.S. 367 (1983).

DISCUSSION

The only question raised in the petition is whether petitioner's claim under 42 U.S.C. 1985(1) was properly dismissed in reliance on the Petition Clause and the Seventh Circuit's decision in *Stern*. In light of *McDonald* v. *Smith*, No. 84-476 (June 19, 1985), we think that some of the reasoning of *Stern* is no longer sound. Nevertheless, we believe that the decision below is correct. Moreover, that decision does not conflict with *McDonald*, with any other decision of this Court, or with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The thrust of petitioner's Section 1985(1) claim is that the nonfederal defendants (respondents) demanded his removal or transfer because he was properly performing his duties. The petition (at 3) summarizes this claim as follows:

> The Monfort defendants in response and in retaliation to Mr. Shoultz' attempts to strictly enforce USDA rules and regulations, embarked on a program to harrass, persecute, and otherwise interfere with his activities as a federal meat inspector, and knowingly and maliciously sought to cause the USDA to discharge him from his employment or remove him from their plant. Specifically, Mr. Monfort telephoned Mr. Shoultz' superiors in Washington, D.C., demanding that he be removed from the Greeley plant and be reassigned to inspect another plant owned by another

company. Mr. Addoms wrote a letter to Mr. Shoultz' more immediate supervisors in Colorado in an effort to get him out of the plant, as a result of which D. W. Anderson, the USDA Area Supervisor for MPI in Colorado (R. 18), and the other federal officials detailed Mr. Shoultz on October 4, 1977, to another USDA-inspected facility in Denver (Tr. 21).

It should be noted that neither the complaint (see Pet. App. 43) nor the petition alleges that respondents communicated slanderous or libelous information about petitioner to his superiors—or indeed that they communicated any information at all. What is alleged is that they telephoned and wrote demanding his discharge or transfer. This alleged conduct is not actionable under 42 U.S.C. 1985(1).

Section 1985(1) creates a cause of action for damages against persons who engage in four separate types of conspiracies. These are conspiracies:

> [1] to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof;
>
> [2] or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed[;]
>
> [3] or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof[;]
>
> [4] or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties[.]

Petitioner's complaint appears to allege that the first three of these provisions were all violated (see Pet. App. 46-47). However, the first two portions of Section 1985(1) expressly require "force, intimidation, or threat," and petitioner has not alleged that respondents attempted to procure his dismissal or transfer by these means. See Pet. App. 43; Pet. 3. According to petitioner (Pet. 3), respondents merely "sought to cause" and "demand[ed]" his dismissal or transfer.

Nor do we believe that petitioner has stated a claim under the third portion of Section 1985(1). A strong argument can be made that this provision, like the first two portions of Section 1985(1), requires "force, intimidation, or threat." In *Stern,* the Seventh Circuit rejected this argument based solely on the syntax of the modern statutory provision (see 547 F.2d at 1336-1337). But in its original form, as part of Section 2 of the Ku Klux Act, this provision may well have required "force, intimidation, or threat,"[1] and the subsequent codification of this provision "was not intended to change the substantive meaning of the 1871 Act." *Kush* v. *Rutledge,* 460 U.S. 719, 724 (1983) (footnote omitted). Furthermore, as the *Stern* court recognized, the legislative history shows that Congress's concern centered on such violent actions.

Even if the portion of Section 1985(1) at issue here does not require force, intimidation, or threat, petitioner's complaint still failed to state a claim.[2] As *McDonald* shows,

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[1]Section 2 of the Ku Klux Act is reprinted as an appendix to this brief. See pages 1a-3a, *infra.*

[2]At the very least, the term "injure" in this portion of Section 1985(1) should be construed to require wrongful action. The primary definition of "injure" in *Black's Law Dictionary* 706 (5th ed. 1979) is "[t]o violate the legal right of another or inflict an actionable wrong." This limitation is also necessary to prevent Section 1985(1) from reaching lawful conduct that Congress could not have meant to proscribe. For example, if

Stern was wrong in suggesting that persons who make defamatory communications to public officials are absolutely immune under the Petition Clause from suits for libel or slander. But *McDonald* did not question that the Petition Clause may preclude suits based on communications that are not defamatory. Indeed, this Court, in construing federal statutes, has eschewed interpretations that "would raise important constitutional questions" under the Petition Clause. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). See also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-671 (1965); but see *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). In the present case, the provision of Section 1985(1) in question should not be construed to reach nondefamatory Petition Clause activity, absent clear support for such a construction in either the language of the statute or the legislative history.

2. The decision in this case does not conflict with *McDonald*. In *McDonald*, a disappointed candidate for the position of United States Attorney brought a libel action in state court against the author of disparaging letters sent to the President and other federal officials. After removal of the case to federal court, the defendant moved for judgment on the pleadings, claiming that the Petition Clause provided absolute immunity. The lower courts rejected this argument, and this Court unanimously affirmed, holding that the Petition Clause does not provide absolute immunity for

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a group placed a newspaper advertisement publicizing derogatory but *truthful* information about a federal officer because of the group's displeasure with his lawful discharge of his office, their conduct might well fall within Section 1985(1) if the term "injure" is not restricted to wrongful conduct. But such a suit obviously would raise serious First Amendment problems. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

individuals who express libelous falsehoods in letters to government officials.

McDonald is distinguishable from the present case on at least two grounds. First, *McDonald* involved allegedly defamatory statements. Second, *McDonald* involved a claim of constitutional immunity from suit, not the construction of Section 1985(1).[3] (Petitioner does not appear to appreciate this distinction. His "Question Presented" erroneously describes this case as involving an immunity question. See Pet. i.) Even if the Petition Clause would allow a broader interpretation of Section 1985(1) than the one we believe is correct, that does not mean that Congress intended the statute to carry that broader meaning.

3. Contrary to petitioner's contention (Pet. 10-11), the decision in this case also does not conflict with *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983), cert. denied, No. 83-1920 (Oct. 1, 1984), or *Mayer* v. *Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1023 (9th Cir. 1983). *Windsor* involved claims for printing defamatory material "knowing the information to be false or with reckless disregard of its truth or falsity" (719 F.2d at 160). Moreover, although Judge Contie's lead opinion concluded that these allegations stated claims under Section 1985(1) (719 F.2d at 160-162), it upheld their dismissal on other grounds (*id.* at 162-165). Thus, the opinion's discussion of Section 1985(1) was dictum. Indeed, no other member of

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[3]Petitioner states that *McDonald* also involved a Section 1985(1) claim, citing the district court's decision in *McDonald* as holding that "the First Amendment privilege was an absolute barrier to plaintiff's claim under 42 U.S.C. 1985" (Pet. 7). The reported opinions in *McDonald*, however, give no indication that the plaintiff there (who only was a prospective government officer) had presented a Section 1985(1) claim (see *Smith* v. *McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983), aff'd, 737 F.2d 427 (4th Cir. 1984), aff'd, No. 84-476 (June 19, 1985)).

the panel agreed with Judge Contie's First Amendment analysis.[4]

Mayer v. *Wedgewood Neighborhood Coalition, supra,* is further afield. There, a complaint under 42 U.S.C. 1985(3) was dismissed for lack of standing, and the defendants were awarded attorney's fees. On appeal, only the issue of attorney's fees was raised, and the court of appeals reversed. The court of appeals held that the complaint, which "alleged defendants tortiously interfered" (707 F.2d at 1022) with the construction of a lower-income housing project, was not frivolous or vexatious and that the award of attorney's fees was therefore unjustified. Since *Mayer* (a) involved a different statute, (b) involved allegations of tortious conduct, and (c) was concerned solely with the award of attorney's fees, it has no bearing here.

4. Finally, all else aside, we cannot conclude that the issue presented in this case is of sufficient importance to warrant further review. Section 1985(1) is a little-used statute. In addition, federal officers like petitioner who are aggrieved by adverse personnel actions have ample means of administrative and judicial redress. Recognition of a cause of action under Section 1985(1) in the circumstances of this case is not needed to protect their interests. See *Bush* v. *Lucas,* 462 U.S. 367 (1983); *Lawrence* v. *Acree,* 665 F.2d 1319, 1328 (D.C. Cir. 1981) (Wald, J., concurring); Pet. App. 25, 32.

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[4]Judge Edwards joined Judge Contie's opinion but expressly noted that he "would accept the First Amendment reasoning of the majority in *Stern*" (719 F.2d at 166). Judge Moynahan merely concurred in the result, believing that the suit was barred by absolute immunity (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

APPENDIX

Section 2 of the Ku Klux Act, ch. 22, 17 Stat. 13 provided (emphasis added):

> That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or *by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty,* or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the

United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a

period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."